Filed 8/24/17 P. v. Hicks CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. VERNDELL RAYMONE HICKS, Defendant and Appellant.	F071016 (Super. Ct. No. BF155264A) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Brian M. McNamara, Judge.

Peter J. Boldin, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and John A. Bachman, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Verndell Raymone Hicks appeals his 2015 sentence, arguing it improperly includes a one-year enhancement for a prior prison term under Penal Code[1] section 667.5, subdivision (b) (section 667.5(b)). That enhancement was based on a 2013 felony drug possession conviction, which was designated a misdemeanor pursuant to Proposition 47, the Safe Neighborhoods and Schools Act (Act), one year after he was sentenced in 2015, while this appeal was pending. Under *In re Estrada* (1965) 63 Cal.2d 740, 748 (*Estrada*), we conclude that Proposition 47 applies to section 667.5(b) enhancements in judgments that are not yet final. Because Hicks's judgment is not yet final, we strike the enhancement.

FACTUAL AND PROCEDURAL SUMMARY

At around 1:00 a.m. on June 2, 2014, Hicks punched Donald Craine in the face as Craine lay sleeping in bed. Craine awoke when he was punched in the right eye. Craine did not see who hit him, but when he awoke after being punched Hicks was standing over him. Hicks appeared angry and told Craine not to call the police.

The punch caused two facial fractures, one to Craine's "right medial orbit, and also the floor of the orbit." The punch also caused a seizure lasting four to five minutes. The injuries were consistent with a punch, not with falling or being hit with an object.

Craine testified that his eye "is broken in three spots, my sinus cavity is crushed," and he had vision problems. At the time of trial, Craine was "still numb, have a constant problem in the sinus cavity. And I had a brain infection."

On December 17, 2014, the jury found Hicks guilty of count one, assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4)), and count two, felony battery resulting in serious bodily injury (§ 243, subd. (d)). The jury also found true a section 12022.7, subdivision (a) personal infliction of great bodily injury enhancement appended to count one.

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1 References to code sections are to the Penal Code.

The trial court found true the allegation that Hicks had suffered three prior convictions arising out of two separate March 2, 2004, events that qualified as serious felonies and strikes, within the meaning of section 667, subdivisions (a) and (e). It also found true that Hicks had served a prior prison term within the meaning of section 667.5 (b), arising out of a 2013 felony drug possession conviction.

At the February 5, 2015, sentencing hearing, the trial court struck two of the prior 2004 convictions and sentenced Hicks to a total term of 17 years in prison, calculated as follows: the upper term of four years on count 1, doubled to eight years for the remaining strike; three years for the section 12022.7 enhancement; five years for the one remaining prior serious felony strike; and one year for the section 667.5(b) enhancement. A term of eight years for the count 2 offense was imposed, but stayed pursuant to section 654.

Hicks filed a written statement that he was appealing his case on February 11, 2015. The abstract of judgment was filed February 19, 2015. The abstract sets forth an incorrect sentence of two years for the count two conviction.[2]

DISCUSSION

Hicks contends that because his 2013 prior felony conviction for drug possession was reduced to a misdemeanor in 2016, before the judgment and sentence for his current convictions was final, the one-year section 667.5(b) enhancement should be stricken. He also asserts defense counsel rendered ineffective assistance by not seeking Proposition 47 relief prior to sentencing on the instant offenses.

I. SECTION 667.5 AND PROPOSITION 47

Hicks committed the offenses that are the subject of this appeal in June 2014. Proposition 47 was enacted and became effective in November 2014. Hicks was convicted in December 2014, was sentenced in February 2015, and appealed. While his

[2] The trial court is directed to correct this clerical error in the modified abstract of judgment.

appeal was pending, Hicks petitioned the Los Angeles Superior Court in February 2016 to have his 2013 felony conviction designated a misdemeanor under Proposition 47 (§ 1170.18). The petition was granted in March 2016.[3]

The issue as presented is whether the additional one-year enhancement imposed by the trial court pursuant to section 667.5(b), for the 2013 prior conviction must now be stricken because, subsequent to Hicks's conviction and sentencing, the 2013 prior conviction was reduced to a misdemeanor pursuant to section 1170.18, subdivision (f). We conclude it must be reversed because the sentence and judgment for the current offenses were not final at the time the 2013 felony was reclassified.

Shortly before Hicks's trial, on November 4, 2014, voters enacted Proposition 47, which went into effect the next day. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089.) As relevant here, the Act reduced certain felony drug possession offenses to misdemeanors, unless committed by an ineligible defendant. (*People v. Lynall* (2015) 233 Cal.App.4th 1102, 1108; see § 1170.18, subd. (i).) It also provided a mechanism by which a person who had completed his or her sentence for a conviction of a felony that was made a misdemeanor by the Act, could apply to the trial court that entered the judgment of conviction and have the felony offense designated as a misdemeanor. (§ 1170.18, subds. (f), (g).) Section 1170.18, subdivision (k) specifies that any "felony conviction that is … designated as a misdemeanor under subdivision (g) shall be considered a misdemeanor for all purposes" except resentencing does not permit the person to own or possess a firearm.

Neither Proposition 47 nor the ballot materials addressed section 667.5 or recidivist enhancements. However, it is apparent that Proposition 47 was intended to reduce punishment for "nonserious, nonviolent crimes like petty theft and drug possession." (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 3,

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3 Hicks's request to take judicial notice filed March 11, 2016, is hereby granted.

subd. (3), p. 70). In addition, one of the purposes of Proposition 47 was to "ensure that prison spending is focused on violent and serious offenses, to maximize alternatives for nonserious, nonviolent crime…." (*Id.*, § 2, p. 70.) To achieve that end, the measure "[r]equire[s] misdemeanors instead of felonies for nonserious, nonviolent crimes like petty theft and drug possession." (*Id.*, § 3, subd. (3), p. 70.) The electorate also directed that Proposition 47 "'shall be liberally construed to effectuate its purposes.'" (*Alejandro N. v. Superior Court* (2015) 238 Cal.App.4th 1209, 1222.)

Hicks contends the benefits of section 1170.18, subdivision (k) under Proposition 47 should apply to non-final judgments, like his. We agree. The plain language of Proposition 47 ("shall be considered a misdemeanor for all purposes") explicitly anticipates misdemeanor classification will affect the collateral consequences of felony convictions, except permitting ownership or possession of a firearm. Section 1170.18, subdivision (k)'s "for all purposes" language is broad, and reflects the voters' clear intention that –with the exception of firearm possession—reclassified misdemeanors be treated like any other misdemeanor offense, including for purposes of enhancements under section 667.5, subdivision (a). (*People v. Abdallah* (2016) 246 Cal.App.4th 736, 746.)

Here, Hicks committed his 2014 crimes and sentence was imposed before the 2013 offense was reduced to a misdemeanor in 2016. However, the judgment in his 2014 case was not final at the time the 2013 conviction was reduced to a misdemeanor because that judgment was appealed and that appeal is currently pending. (See *People v. Towne* (2008) 44 Cal.4th 63, 80-81.) We conclude defendants may challenge prior prison term enhancements based on reclassified convictions so long as the enhanced sentence is not subject to a final judgment.

Our conclusion that section 1170.18, subdivision (k) applies to non-final enhancements comports with the holding of *Estrada*, that when an amendatory statute mitigates punishment, contains no savings clause, and "becomes effective prior to the

date the judgment of conviction becomes final," the new statute and "not the old statute in effect when the prohibited act was committed," applies. (*Estrada, supra,* 63 Cal.2d at p. 744.) "The key date [in determining whether a defendant receives the benefit of a statutory change] is the date of final judgment." (*Ibid.*) Like *Estrada*, Proposition 47 took effect before Hicks's trial, conviction and sentence. Based on the language of section 1170.18 and the voter's intent in passing the initiative, we conclude Proposition 47 applies to sentence enhancements not yet final.[4]

Although defendant urges us to strike the prior prison term enhancement, this in essence asks this court to resentence him. While defendant has successfully petitioned to reduce his offense to a misdemeanor under section 1170.18, subdivisions (f) and (g), he has not been evaluated for resentencing under subdivisions (a), (b), and (c) of that section. Simply striking the prior prison term on appeal would usurp the trial court's discretion to deny resentencing on the ground defendant poses an "unreasonable risk of danger to public safety." (See § 1170.18, subds. (b) & (c); *Harris v. Superior Court* (2016) 1 Cal.5th 984, 992 ["This discretion to find an unreasonable risk provides the 'safety valve' to protect the public"].) Consequently, we remand the matter to the sentencing court to strike the enhancement unless it determines defendant poses an unreasonable risk of danger to public safety.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

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4 We note the issue is currently pending review in the California Supreme Court. (See *People v. Johnson* (2017) 8 Cal.App.5th 111, review granted Apr. 12, 2017, S240509; *People v. Evans* (2016) 6 Cal.App.5th 894, review granted Feb. 22, 2017, S239635; *People v. Jones* (2016) 1 Cal.App.5th 221, review granted Sept. 14, 2016, S235901; *People v. Williams* (2016) 245 Cal.App.4th 458, review granted May 11, 2016, S233539; *People v. Ruff* (2016) 244 Cal.App.4th 935, review granted May 11, 2016, S233201; *People v. Carrea* (2016) 244 Cal.App.4th 966, review granted Apr. 27, 2016, S233011; *People v. Valenzuela* (2016) 244 Cal.App.4th 692, review granted Mar. 30, 2016, S232900.)

Because we are reversing the 667.5 enhancement, we need not address the ineffective assistance of counsel claim.

DISPOSITION

The matter is remanded for a determination of whether the prior prison term enhancement should be stricken. In all other respects, the judgment is affirmed.

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FRANSON, J.

Peña, J.

I concur in Justice Franson's opinion. Proposition 47, the Safe Neighborhoods and Schools Act, requires the striking of the prior prison term because (1) it is based on a conviction that is no longer a felony, (2) the sentence to which the prison term is attached is not final, and (3) retroactive application will effectuate the voters' intent in enacting this aspect of the law. I write separately because a different panel from this court has reached the conclusion this aspect of Proposition 47 may not be applied retroactively (*People v. Johnson* (2017) 8 Cal.App.5th 111 (*Johnson*), rev. granted Apr. 12, 2017, S240509), and our traditional practice as a court is to follow our earlier published decisions to provide clear precedent for the trial bench. Because *Johnson* is pending review by our Supreme Court, it "has no binding or precedential effect." (Cal. Rules of Court, rule 8.1115(e)(1).)[1] In addition, the issue we consider is one that generally applies to appellate court decisionmaking, not trial court decisionmaking. This decision will probably only affect our own court, especially our central staff of attorneys. Because it appears the Supreme Court has granted review in all cases that have decided this issue (see, e.g., *People v. Ruff* (2016) 244 Cal.App.4th 935, rev. granted May 11, 2016, S233201; *People v. Valenzuela* (2016) 244 Cal.App.4th 692, rev. granted Mar. 30, 2016, S232900; *People v. Carrea* (2016) 244 Cal.App.4th 966, rev. granted Apr. 27, 2016, S233011; *People v. Williams* (2016) 245 Cal.App.4th 458, rev. granted May 11, 2016, S233539; *People v. Evans* (2016) 6 Cal.App.5th 894, rev. granted Feb. 22, 2017, S239635; *People v. Jones* (2016) 1 Cal.App.5th 221, rev. granted Sept. 14, 2016, S235901), the litigants will not likely be affected until that court decides the issue. For these reasons, I am willing to depart from my usual practice and instead voice my

[1] As a court, we, myself included, have followed the *Johnson* case as persuasive reasoning in our unpublished cases. Justice Franson's decision to reevaluate *Johnson*'s reasoning has caused me to have to pick a side, so to speak.

thoughts on the issue, even though it may result in less predictability for our staff attorneys.

Penal Code[2] section 1170.18 codifies the resentencing and redesignation aspects of Proposition 47. Subdivisions (a) through (e) of section 1170.18 allow for a resentencing of certain offenses reduced to misdemeanors by Proposition 47, so long as the defendant files a petition for sentence recall, satisfies the necessary criteria, and the sentencing court determines the defendant does not pose an unreasonable risk of danger to public safety. (*People v. Morales* (2016) 63 Cal.4th 399, 404; *People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089.) Subdivisions (f) and (g) of section 1170.18 provide a mechanism for petitioning to have certain felony offenses reduced to misdemeanors retroactively, even where the judgment in those cases is final. (*People v. Call* (2017) 9 Cal.App.5th 856, 860 (*Call*); *Alejandro N. v. Superior Court* (2015) 238 Cal.App.4th 1209, 1217 ["the Proposition 47 voters made this felony-to-misdemeanor reclassification available to qualifying offenders on a retroactive basis"].) Prior prison terms are not among the listed "offenses" that may be reduced. Based on this, it seems logical to conclude Proposition 47 does not authorize the retroactive striking of a prior prison term, whose underlying felony is subsequently reduced to a misdemeanor, where the judgment is final. (See *People v. Jones*, *supra*, 1 Cal.App.5th at pp. 228–229.) Subdivision (n) of section 1170.18, which states, "Nothing in this and related sections is intended to diminish or abrogate the finality of judgments in any case not falling within the purview of this act," supports this conclusion.

In addition, the court in *People v. Acosta* (2016) 247 Cal.App.4th 1072, 1078, review granted August 17, 2016, S235773, has articulated a more sweeping view, as follows:

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[2] All statutory references are to the Penal Code unless otherwise noted.

> "There is no mention of the separate and distinct enhancement of prior prison term service in Proposition 47. Section 1170.18, subdivision (k) cannot be construed to apply to the actual service of a prison term. Crediting appellant's contention would be a windfall beyond the imagination of the drafters of Proposition 47. We certainly cannot impute such knowledge to the electorate since there is no mention of it in Proposition 47. Indelible erasure of such for all time for subsequent felonies would be an extreme and unreasonable gift to a recidivist." (*Id.* at p. 1078.)

Further, this view is arguably persuasive because it has received tacit approval from a majority of our Supreme Court in *People v. Valencia* (2017) 3 Cal.5th 347. The court held Proposition 47's language did not apply to Proposition 36 petitioners (the Three Strikes Reform Act of 2012) because the voters would be unaware of this possible application, in spite of the everyday, ordinary language used in the statute, which supported the opposite view. In support of its interpretation, the court stated:

> "Nothing in the materials accompanying the text of Proposition 47 suggested that the initiative would alter the resentencing criteria under the previously enacted Three Strikes Reform Act, resulting in the potential release of additional recidivist serious or violent felony offenders. 'We cannot presume that … the voters intended the initiative to effect a change in law that was not expressed or strongly implied in either the text of the initiative or the analyses and arguments in the official ballot pamphlet.' [Citation.]" (*Valencia*, at p. 364.)

I think it would be a mistake, however, to adopt this view here because it would mean no defendant could benefit from reduction of a prior felony to a misdemeanor as it pertains to future prior prison term enhancements. This would conflict with the provisions in section 1170.18, subdivision (k), that a redesignated felony "shall be considered a misdemeanor for all purposes," and the construction this language has received in *People v. Park* (2013) 56 Cal.4th 782 (*Park*). As we noted in *Call*:

> "In *Park*, the defendant's sentence for his current offenses was enhanced by five years, pursuant to section 667, subdivision (a), based on his earlier conviction of a serious felony. Prior to the defendant's commission of his current crimes, the trial court reduced the prior offense to a misdemeanor under section 17, subdivision (b)(3). (*Park, supra,* 56 Cal.4th at p. 787.)

> Our high court held that 'when the court in the prior proceeding properly exercised its discretion by reducing the … conviction to a misdemeanor, that offense no longer qualified as a prior serious felony within the meaning of section 667, subdivision (a), and could not be used, under that provision, to enhance defendant's sentence.' (*Ibid*.) The court noted there was 'a long-held, uniform understanding that when a wobbler is reduced to a misdemeanor in accordance with the statutory procedures, the offense thereafter is deemed a "misdemeanor for all purposes," except when the Legislature has specifically directed otherwise.' (*Id*. at p. 795.)" (*Call*, *supra*, 9 Cal.App.5th at p. 861, fn. omitted.)

Here, section 1170.18, subdivision (k) specifically "directs otherwise" only as follows: "except that such resentencing shall not permit that person to own, possess, or have in his or her custody or control any firearm or prevent his or her conviction under Chapter 2 (commencing with Section 29800) of Division 9, of Title 4 of Part 6." It does not specifically direct that a redesignated felony to misdemeanor excludes or excepts a prior prison term enhancement based on the former felony. (*Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 195 [where exceptions "are specified by statute, other exceptions are not to be implied or presumed"].) Thus, it seems clear prior prison term enhancements based on a former felony that has been reduced to a misdemeanor before original sentencing may not be used as enhancements under *Call* and *Park*. (Accord, *People v. Kindall* (2016) 6 Cal.App.5th 1199, 1204–1205; *People v. Abdallah* (2016) 246 Cal.App.4th 736, 745–746.) It also seems clear a prior prison term enhancement that has achieved finality before misdemeanor redesignation may not be stricken under the provisions of Proposition 47. (§ 1170.18, subd. (n).) The question presented here is, "Do the provisions of Proposition 47 apply retroactively to a prior prison term enhancement that is not final on appeal?"

In *Johnson*, this court answered "no" to that question. The court stated:

> "Section 3 specifies that no part of the Penal Code 'is retroactive, unless expressly so declared.' This language 'erects a strong presumption of prospective operation, codifying the principle that, "in the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature [or

> electorate] … must have intended a retroactive application." [Citations.] Accordingly, "'a statute that is ambiguous with respect to retroactive application is construed … to be unambiguously prospective.'" [Citation.]' (*People v. Brown* (2012) 54 Cal.4th 314, 324.)
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> "An 'important, contextually specific qualification' to the prospective-only presumption regarding statutory amendments was set forth in *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*). (*People v. Brown*, *supra*, 54 Cal.4th at p. 323.) That qualification is: 'When the Legislature [or electorate] has amended a statute to reduce the punishment for a particular criminal offense, we will assume, absent evidence to the contrary, that the Legislature [or electorate] intended the amended statute to apply to all defendants whose judgments are not yet final on the statute's operative date. [Citation.]' (*Ibid*., fn. omitted.)"

It seems clear to me the provisions permitting resentencing and reclassification are unambiguously intended to have retroactive application. It says so right in the statute. (See § 1170.18, subds. (a), (b), (f), (g) & (k).) Section 3, which provides a presumption of prospective operation does not apply because the subdivisions of section 1170.18 under discussion expressly state they apply retroactively by way of petition for relief. The court in *People v. Conley* (2016) 63 Cal.4th 646, 657, noted similar provisions under the Three Strikes Reform Act expressly addressed retroactivity by enacting a provision creating "a special mechanism that entitles all persons 'presently serving'" a sentence under the prior law "to seek resentencing under the new law." Under *Conley*, the voters' intent regarding retroactivity of Proposition 47 is manifest. Whether the voters intended to have section 1170.18 apply retroactively to prior prison term enhancements, however, is ambiguous because enhancements are not mentioned in the statute or elsewhere.

On this question, *In re Estrada, supra*, 63 Cal.2d 740 provides the answer. "It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply" provided the judgment "is not final." As just discussed, Proposition 47 was intended to apply to collateral consequences such as prior prison term enhancements. In addition, Proposition 47 expressly provides for retroactive

application of its changes to the prior law. Finally, changes that downgrade felonies to misdemeanors are ameliorative to the criminal law. As stated in *Conley*, "The *Estrada* rule rests on an inference that, in the absence of contrary indications, a legislative body ordinarily intends for ameliorative changes to the criminal law to extend as broadly as possible, distinguishing only as necessary between sentences that are final and sentences that are not." (*People v. Conley*, *supra*, 63 Cal.4th at p. 657.) Because defendant's sentence is still on appeal, it is not final. (*People v. Kemp* (1974) 10 Cal.3d 611, 614 [judgment becomes final when availability of an appeal and time for petitioning for certiorari have expired]; see *People v. Flores* (1979) 92 Cal.App.3d 461, 470–474 [prior prison term enhancement based on 1966 felony marijuana possession conviction, an offense downgraded to a misdemeanor by the Legislature in 1975, ordered stricken on appeal under the *Estrada* rule].)

In *Johnson* we held *Park* not applicable because in *Park* the offense had been reduced to a misdemeanor prior to the defendant's commission of the crimes, whereas in *Johnson*, as here, the offense was reduced after the defendant committed the new offenses. However, in *Park*, the decision to reduce the wobbler offense to a misdemeanor was based on the trial court's decision the defendant should be treated as a misdemeanant rather than a felon under section 17, subdivision (b). Here, the voters determined by initiative legislation that certain offenses would be reclassified solely as misdemeanors. Further, as noted above, these reclassifications were expressly made to apply retroactively. Finally, the voters' intent regarding retroactivity was also expressed in subdivision (k) of section 1170.18, that a redesignated misdemeanor "shall be considered a misdemeanor for all purposes …." There are no contrary indications in the statute or the ballot materials presented to the voters that the ameliorative changes applied narrowly. To the contrary, except for final judgments as noted in subdivision (n), subdivision (m) of section 1170.18 provides for broad application: "Nothing in this section is intended to diminish or abrogate any rights or remedies otherwise available to

the petitioner or applicant." Under these circumstances, the *Estrada* rule applies because the plain language of the statute indicates the voters intended offenders should be able to avoid punishment for redesignated offenses imposed under section 667.5, subdivision (b) where the sentence is not final. (See *People v. Evans*, *supra*, 6 Cal.App.5th at p. 903.)

Defendant has successfully reduced the underlying enhancement offense to a misdemeanor through the redesignation procedures of section 1170.18, subdivisions (f) and (g). I agree the matter should be remanded so the sentencing court may strike the prior prison term enhancement, unless it determines defendant poses unreasonable risk of danger to public safety. (See § 1170.18, subds. (b) & (c); *Harris v. Superior Court* (2016) 1 Cal.5th 984, 991–992.)

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PEÑA, J.

LEVY, Acting P. J.

I respectfully dissent from the lead and concurring opinions that Proposition 47, "the Safe Neighborhoods and Schools Act" (Proposition 47), applies to enhancements pursuant to Penal Code section 667.5, subdivision (b), in judgments that are not yet final.

Penal Code section 3 specifies that no part of the Penal Code "is retroactive, unless expressly so declared." This language "erects a strong presumption of prospective operation, codifying the principle that, 'in the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature [or electorate] … must have intended a retroactive application.' [Citations.] Accordingly, '"a statute that is ambiguous with respect to retroactive application is construed … to be unambiguously prospective."' [Citation.]" (*People v. Brown* (2012) 54 Cal.4th 314, 324.)

In *People v. Johnson* (2017) 8 Cal.App.5th 111, review granted April 12, 2017, S240509 (*Johnson*), this court held that the granting of a Proposition 47 application does not alter a previously imposed sentence enhancement under Penal Code section 667.5, subdivision (b). (*Johnson, supra,* 8 Cal.App.5th at p. 115, review granted.) *Johnson* held that nothing in Proposition 47's language "or the ballot materials indicates an intention to override the operation of section 667.5, subdivision (b), at least retroactively." (*Johnson, supra,* 8 Cal.App.5th at p. 123.) Because *Johnson* is pending review by our Supreme Court, it "may be cited for potentially persuasive value only." (Cal. Rules of Court, rule 8.1115(e)(1).) Although *Johnson* has no binding or precedential effect, there is no reason to deviate from its well-analyzed position.

The lead and concurring opinions rely on *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*) in finding retroactive application. (Lead opn., *ante,* at pp. 2, 6; conc. opn., *ante*, at pp. 5-7.) This reliance is misplaced. Our Supreme Court has emphasized the narrowness of *Estrada*'s broad language. (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1196, disapproved on another ground in *People v. Rangel* (2016) 62 Cal.4th 1192,

1216.) *Estrada* does not weaken or modify the default rule of prospective operation codified in Penal Code section 3, but rather informs the "rule's application in a specific context by articulating the reasonable presumption that a legislative [or voter] act mitigating the punishment for a particular criminal offense is intended to apply to all nonfinal judgments. [Citation.]" (*People v. Brown, supra,* 54 Cal.4th at p. 324.) Thus, as we concluded in *Johnson*, the question of retroactivity turns on voter intent.

The intent of Proposition 47 was to lessen punishment for nonserious and nonviolent crimes. (*Johnson, supra,* 8 Cal.App.5th at p. 120, review granted.) Voters were assured that dangerous criminals would be kept locked up. (*Id.* at p. 121.) As the lead opinion acknowledges, neither Proposition 47 nor the ballot materials reference Penal Code section 667.5, subdivision (b), or mention recidivist enhancements. (Lead opn., *ante*, at p. 4.) Proposition 47 did not amend these provisions. (*Johnson, supra,* at p. 121.)

Penal Code section 1170.18 codifies the resentencing and redesignation aspects of Proposition 47. Subdivisions (f) and (g) of this section provide a mechanism for petitioning to have certain felony offenses reduced to misdemeanors for a person who has completed his or her sentence. (*People v. Call* (2017) 9 Cal.App.5th 856, 860.) As the concurring opinion acknowledges (conc. opn., *supra*, at p. 2), prior prison terms are not among the listed felonies that may be reduced. (Pen. Code, § 1170.18, subd. (a).) Further, Penal Code section 1170.18 expressly states that "[n]othing in this and related sections is intended to diminish or abrogate the finality of judgments in any case not falling within the purview of this act." (Pen. Code, § 1170.18, subd. (n).) Based on the express language of these sections, it is logical to conclude that Proposition 47 does not authorize the retroactive striking of a prior prison term. (See *People v. Jones* (2016) 1 Cal.App.5th 221, 228-229, review granted Sept. 14, 2016, S235901.)

"Sentence enhancements for prior prison terms are based on the defendant's status as a recidivist, and not on the underlying criminal conduct, or the act or omission, giving

rise to the current conviction. [Citations.]" (*People v. Gokey* (1998) 62 Cal.App.4th 932, 936.) "The purpose of the section 667.5(b) enhancement is 'to punish individuals' who have shown that they are '"hardened criminal[s] who [are] undeterred by the fear of prison."' [Citation.]" (*In re Preston* (2009) 176 Cal.App.4th 1109, 1115.) "The statutory focus on a 'prison term served' as the basis for an enhancement under section 667.5, subdivision (b), indicates the special significance which the Legislature has attached to incarceration in our most restrictive penal institutions." (*People v. Levell* (1988) 201 Cal.App.3d 749, 754.)

Nothing in Proposition 47 evidences a voter intent to provide retroactive relief for enhancements resulting from recidivism considered serious enough to warrant additional punishment. (*Johnson, supra,* 8 Cal.App.5th at p. 122, review granted.) To the contrary, two of Proposition 47's stated purposes was to "[a]uthorize consideration of resentencing for anyone who is currently serving a sentence for any of the offenses" that would be made misdemeanors by Proposition 47 and to "[r]equire a thorough review of criminal history and risk assessment of any individuals before resentencing to ensure that they do not pose a risk to public safety." (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 3, subds. (4), (5), p. 70.) Voters were assured Proposition 47 would keep dangerous criminals locked up (Voter Information Guide, Gen. Elec., *supra*, argument in favor of Prop. 47, p. 38), and that it would not require automatic release of anyone: "There is no automatic release. [Proposition 47] includes strict protections to protect public safety and make sure rapists, murderers, molesters and the most dangerous criminals cannot benefit." (*Id.*, rebuttal to argument against Prop. 47, p. 39.)

Proposition 47 contains no clear expression of retroactivity. The closest it gets is the statement, in subdivision (k) of section 1170.18, that "[a]ny felony conviction that is … designated as a misdemeanor under subdivision (g) shall be considered *a misdemeanor for all purposes*, except [specified firearm laws]." (Italics added.) This language, however, is not conclusive. (*Johnson, supra,* 8 Cal.App.5th at p. 123, review

granted, citing *People v. Park* (2013) 56 Cal.4th 782, 793, 794 (*Park*).) Further, this language, the italicized portion of which is identical to Penal Code section 17, subdivision (b), does not mean a defendant can avoid an imposed sentence enhancement in his current sentence by having the prior offense subsequently reduced to a misdemeanor. (*Johnson, supra,* 8 Cal.App.5th at p. 123, citing *Park, supra,* 56 Cal.4th at p. 802.)

As we stated in *Johnson*, "[a] person who refuses to reform even after serving time in prison is clearly and significantly more dangerous than someone who merely possesses drugs for personal use or shoplifts. We cannot conclude, from the language of [Proposition 47] or the ballot materials, that voters deemed such persons to be nonserious, nondangerous offenders, and so intended [Proposition 47] to reach back to ancillary consequences such as enhancements resulting from recidivism considered serious enough to warrant additional punishment. Accordingly, [Penal Code] section 3's default rule of prospective operation, and not *Estrada*'s narrow rule of retroactivity, applies." (*Johnson, supra,* 8 Cal.App.5th at p. 122, review granted.)

Park, supra, 56 Cal.4th 782, does not support a finding of retroactivity in this situation. In *Park,* the defendant received a five-year sentence enhancement under section 667, subdivision (a), based on his prior conviction of a serious felony. *Prior to* the defendant's commission of his current crimes, however, the trial court reduced the prior offense to a misdemeanor under section 17, subdivision (b)(3). (*Park, supra,* 56 Cal.4th at p. 787.) In *Park,* the Court of Appeal held that the conviction remained a prior serious felony for purposes of sentence enhancement under section 667, subdivision (a). Our Supreme Court, however, disagreed: "[W]hen the court in the *prior proceeding* properly exercised its discretion by reducing the … conviction to a misdemeanor, that offense no longer qualified as a prior serious *felony* within the meaning of section 667, subdivision (a), and could not be used, under that provision, to enhance defendant's sentence." (*Park, supra,* 56 Cal.4th at p. 787.)

In *Park*, the reduction occurred prior to the defendant's commission of his current crimes. (*Park, supra*, 56 Cal.4th at p. 787.) Here, as in *Johnson*, the reduction to a misdemeanor pursuant to section 1170.18, subdivision (f), occurred *after* appellant's commission, conviction, and sentence for his current crimes. *Park* is distinguishable.

Based on the language of section 1170.18 and voter intent, the granting of a Proposition 47 application does not alter a previously imposed sentence enhancement under Penal Code section 667.5, subdivision (b). Appellant served a prison term for his prior conviction at a time when the offense was a felony, and he had his current sentence enhanced before that prior conviction was reduced to a misdemeanor. Absent a clear statement of the electorate's intent to the contrary, which is not present, appellant is not entitled to retroactive relief. Accordingly, I would affirm the judgment.

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LEVY, Acting P.J.